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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/752,712
Filing Date: December 28, 2000
Appellant(s): PARKER, JAMES E.

David G. Parkhurst
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/11/07 appealing from the Office action mailed 2/8/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the Examiner. The object to claims 15 and 20 is withdrawn.

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct with respect to the 35 U.S.C. 103 rejection.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,627,152	Wong	9-2003
6,168,758	Forsberg et al.	1-2001
5,501,837	Sayles	3-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims **15, 16, 18, 20, 21** and **23** are rejected under 35 U.S.C. 103(a) as being unpatentable over Wong (USPN 6,627,152) in view of Forsberg et al. (USPN 6,168,758) and Sayles (USPN 5,501,837).

Wong discloses a fluid testing apparatus for collecting and analyzing a liquid sample for an analyte in the liquid sample, the apparatus comprising: a container (20) having an interior sample chamber with a liquid sample space (38), said container having a surface defining an opening (34) in communication with said interior sample chamber, a cap (70, transparent, claim 4) adapted to be placed on said container opening for closing said container opening and sealing said container (fig. 1), an assay strip (120) disposed in said cap, said assay strips having an assay region disposed in said cap for indicating the presence or absence of multiple analytes in a liquid sample placed in said liquid sample space of said interior chamber and said cap (col. 4, lines 40-61), including a separator member (88) disposed between said assay strip and said interior sample chamber for separating said liquid sample space from said assay region of said assay strip; and a wick (end of assay strip is pad that is used to draw liquid from

container into the assay region to the assay test strip; col . 4, lines 32-36) mounted to said cap and extending into said liquid sample space of said interior sample chamber when said cap is placed on said container, said wick being in fluid communication with said assay strip for conducting a portion of the liquid sample from said interior chamber to said assay region of said assay strip (col. 4, lines 32-36).

Wong does not teach using an "annular" bridging member to link the assay strip to the wicking member in a fluid communication fashion.

Forsberg teaches a liquid sample assay device that comprises a container for collecting the sample liquid to be analyzed, a removable cap for sealing the container 7, the cap includes one or more test strips 5. At least one liquid permeable main wick 3 is provided for transporting the sample liquid through the passageway 14. The wicks 3 transport the sample liquid 30, by capillary action, from the reservoir to a plurality of bridging wick pads 4, as discussed in more detail below. If only a single type of test is being conducted, it will be understood that only one wick would be required. Similarly, one wick can be used to supply liquid to a plurality of test strips. Figure 2, shows 4 bridging wick pads disposed in a pattern which defines the outer sides of a regular polygon such as a square. Forsberg further teaches an indentation 12 which is formed over each of the passageways 14 on the top surface of the cap 7. The indentations 12 are each sized to accept a wick pad 4 which is formed of a non-woven glass fibre material through which the sample liquid will move by capillary faction. The wick pads 4 are located adjacent to the assaying device which may comprise a plurality of known liquid test strips 5, and function to draw liquid up through the wicks 3 and to transfer

sample liquid 30 to the test strips 5 which are located on the cap 7. A wicking system comprising the main wicks 3, the bridging wick pads 4 provides transferring means for transferring sample liquid 30 from the reservoir 18 to the test strips 5. The bridging wick of Fosberg provides a fluid communication between the main wicks 3 and the test strips 5 (see figure 2 specifically because of circular configuration). The bridging wick pads of Forsberg perform the same function of the annular bridging wick of the instant application. Webster's Ninth New Collegiate Dictionary defines annular, "of, relating to, or forming a ring." In figure 2, it appears that the bridging wick pads 4 form a ring. The 4 wicking pads create an open center which would provide the opening of the ring. Annular bridging wicks are well known in the art for either providing fluid communication between a main wick and a test strip or an annular perimeter wick for absorbing excess sample liquid to prevent the test strips from being flooded (see fig. 2, ref. 6, col. 6, lines 30-37). See also Sayles who teaches an annular wick 38 in contact with test strips 32. It would have been obvious to one having ordinary skill in the art to modify Wong in view of Fosberg and Sayles to provide an "annular" bridging wick between the main wick and test strips to aid in drawing fluid from the wicks 3 by capillary action and supplying the test strips 5 with a sample fluid (Sayles, column 4, lines 20-24; Forsberg, column 6, lines 7-27).

(10) Response to Argument

The Appellant argues, "Wong does not disclose a cap with a test strip end portions extending into a container interior sample chamber liquid sample space when a cap is placed on the container." The Examiner would like to clarify how the test strips come into contact with the sample fluid when the cap is fitted on the container. Wong discloses a receptacle 52 which brings a fluid sample to the come into contact with the test strip 80 (col. 4, line 66- col. 5, line 21). Since the sample in the receptacle is provided in the interior of the sample container, it is submitted that Wong is structurally capable of performing the limitation of the test strip end portions extend into the liquid sample space of the interior sample chamber when the cap is placed on the container.

The Appellant argues, the prior art does not disclose an annular bridging wick piece adjacent to and in fluid communication with a wick and is in immediate contact with an assay strip or strips for conducting a liquid sample from the wick to the assay strips. The Examiner asserts that the wick pads 4 of Forsberg from a "ring" as defined by Webster's Ninth New Collegiate Dictionary. The four pads together form a ring, an opening is created in the center of the four pads when they are placed in the arrangement as seen in figure 2. The Appellant states Forsberg discloses four wick rounded flattened wick pads arranged in a square pattern. The Examiner submits that the Appellant interprets this arrangement in a square pattern but the Examiner maintains this wick pad orientation best describes a ring orientation. Nonetheless, the Examiner has provided the prior art of Sayles to specifically teach an annular ring and states annular bridging wicks are well known in the art for either providing fluid

communication between a main wick and a test strip or an annular perimeter wick for absorbing excess sample liquid to prevent the test strips from being flooded (see fig. 2, ref. 6, col. 6, lines 30-37). Therefore, it would have been obvious to one having ordinary skill in the art to modify Wong in view of Fosberg and Sayles to provide an "annular" bridging wick between the main wick and test strips to aid in drawing fluid from the wicks 3 by capillary action and supplying the test strips 5 with a sample fluid (Sayles, column 4, lines 20-24; Forsberg, column 6, lines 7-27).

The Appellant argues the prior art of Sayles as teaching an absorbent pad 38 which is annular that is not connected between a wick and an assay strip in fluid communication with the wick and the assay strip. Sayles is only employed to teach that annular wicks are well known in the art of transferring fluids in a testing device. The Examiner modified Wong to employ the absorbent pads 4 of Forsberg and stated that when the four absorbent pads are placed together in the apparatus they form a ring. The Examiner then looked to the teaching of Sayles to specifically teach an annular ring absorbent pad and stated that these annular absorbent pads are well known in the art for sample fluid transfer. Therefore, it would have been obvious to one having ordinary skill in the art to modify Wong in view of Fosberg and Sayles to provide an "annular" bridging wick between the main wick and test strips to aid in drawing fluid from the wicks 3 by capillary action and supplying the test strips 5 with a sample fluid (Sayles, column 4, lines 20-24; Forsberg, column 6, lines 7-27).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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